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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EMMANUEL STANLIN PORTILLO, Defendant and Appellant.	B293016 (Los Angeles County Super. Ct. No. SA034981)

APPEAL from an order of the Superior Court of Los Angeles County. Kathryn A. Solorzano, Judge. Affirmed.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

In 1999, defendant and appellant Emmanuel Stanlin Portillo was convicted, pursuant to a plea of nolo contendere, of two counts of first degree robbery (Pen. Code, § 211)[1] and one count of simple kidnapping (§ 207). In 2018, defendant filed a motion to vacate his convictions pursuant to section 1473.7, on the ground that prejudicial error affected his "ability to meaningfully understand . . . or knowingly accept" his plea's adverse immigration consequences. The trial court denied the motion, and defendant timely appealed.

We affirm.

BACKGROUND

Defendant's 1999 Plea

In an information filed by the Los Angeles County District Attorney's Office, defendant was charged with two counts of first degree robbery (§ 211) and one count of kidnapping to commit robbery (§ 209, subd. (b)(1)). It was further alleged that defendant had a prior "strike" conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On May 6, 1999, pursuant to a negotiated plea agreement, defendant pled nolo contendere to the two robbery counts and to a reduced count of simple kidnapping (§ 207), and admitted the truth of the prior strike allegation. He was sentenced to 16 years in state prison.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

According to the trial court's minutes from May 6, 1999,[2] defendant was advised: "If you are not a citizen, . . . a conviction of the offense for which you have been charged *may* have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Italics added.)

Section 1473.7 Motion

On March 22, 2018, defendant filed a motion, pursuant to section 1473.7, to vacate his convictions from 1999. He argued that his retained trial counsel at the time of his plea (counsel) failed to investigate and adequately advise him of the plea's adverse immigration consequences or seek an "immigration-neutral plea[.]" Counsel thus rendered ineffective assistance of counsel, which constituted prejudicial error that damaged defendant's ability to meaningfully understand or knowingly accept that his plea would expose him to almost certain deportation.[3]

In his supporting declaration, defendant stated that he was born in El Salvador in 1979 and entered the United States around 1981. He became a lawful permanent resident in 1990, at age 10. The United States was defendant's "home"; he had never left since his first entry. His parents and son (born in 1996) were United States citizens.

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[2] No plea form appears in the record and the reporter's transcript of the plea colloquy was destroyed pursuant to Government Code section 69955, subdivision (e).

[3] As an exhibit to the motion, defendant attached a November 2017 notice for him to appear in immigration court for removal proceedings.

Defendant averred that, when he entered his plea in 1999, he was neither advised of the "details of the immigration consequences" nor informed of a plea option "that would allow [him] to avoid any adverse immigration consequences[.]" He stated, "Had I known that my pleas would have such a detrimental effect on my immigration status and virtually guarantee I would be deported, I would not have entered the pleas. I would have either gone to trial or accepted an offer that gave me at least a possibility of remaining in the United States with my family[.]"

The People opposed the motion.

Counsel's Testimony

Counsel was the sole witness at the evidentiary hearing on defendant's motion held on June 27, 2018.[4]

At the time of his testimony, counsel had been practicing law for 40 years. His main area of practice was criminal law; he had never practiced immigration law. Counsel had no recollection of defendant or of having represented him in 1999. Also, he had been unable to find his file on defendant's case.

Although he had no specific memory of any immigration advice he gave to defendant prior to his plea, counsel described his standard practice as to immigration advisements to noncitizen clients around 1999 as follows: "Just that this is going to affect your—or could affect your immigration status in this country and you need to consider that in making this decision. [¶] I would emphasize it more in cases . . . where there were less serious offenses, like a drunk driving or drug possession case. [¶] [In s]omething[] like [defendant's case] it wouldn't have been as

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[4] Defendant, who was in federal immigration custody at the time, did not appear at the hearing.

pressing, because I'm trying to keep the guy from doing life in prison. That was the main concern of the case. [¶] But I would have told him it's going to affect your immigration consequences and that if you desire you can consult an immigration attorney about it." He stated that it was "common sense" that a crime like that of which defendant was convicted "would have led to deportation or exclusion or whatever." He would have told defendant that "this is going to be a problem for you in immigration."

Counsel was "amazed" by the disposition he achieved for defendant, though he lacked any independent recollection of how it was obtained. Based on the charges, he did not think "an immigration neutral charge" would have been an option.

Trial Court's Order

On August 8, 2018, the trial court issued a written order denying defendant's motion. The court found that defendant "meaningfully understood and knowingly accepted the actual or potential adverse consequences of his plea; and knowingly forfeited his right to defend against the actual or potential adverse immigration consequences of a plea."

Defendant had "failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel under[,]" inter alia, *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*). The trial court inferred from defendant's declaration "a tacit admission that he received *some* information from his lawyer about the future immigration consequences of his plea" and found "no evidence that . . . [counsel] gave [defendant] the *wrong* advice about deportability." Based on counsel's credible testimony regarding his standard practice, the court inferred that "[counsel] told [defendant] that he would be

pleading to an aggravated felony and that he would be deported." Moreover, the court did not find that counsel could have obtained an immigration neutral plea.

Defendant had also failed to establish prejudice; given the indeterminate life sentence he was facing, the trial court did "not find a reasonable probability that [defendant] would have rejected the plea had he been properly advised."

Appeal

Defendant timely appealed from the order denying his section 1473.7 motion.

DISCUSSION

I. Section 1473.7

A. As first enacted

Effective January 1, 2017, section 1473.7 provided, in relevant part, that "[a] person no longer imprisoned or restrained may prosecute a motion to vacate a conviction" on the ground that it "is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (Former § 1473.7, subd. (a)(1).)

"California courts uniformly assumed, as the trial court did here, that moving parties who claim prejudicial error was caused by having received erroneous or inadequate information from counsel, must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing norms, as well as a reasonable probability of a different outcome if counsel had rendered effective assistance. Those courts either expressly or impliedly followed the guidelines enunciated in *Strickland*[, *supra*,] 466 U.S. [at pp. 688, 694]. [Citations.]"

(*People v. Camacho* (2019) 32 Cal.App.5th 998, 1005 (*Camacho*).) In other words, the moving party was required to prove a claim of ineffective assistance of counsel. (*People v. Mejia* (2019) 36 Cal.App.5th 859, 861 (*Mejia*).)

B. As amended

The Legislature amended section 1473.7, effective January 1, 2019. (*Camacho*, *supra*, 32 Cal.App.5th at p. 1006.) The amended, current version of the statute provides, in relevant part, that "[a] person who is no longer in criminal custody may file a motion to vacate a conviction" on the ground that it "is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. *A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel*." (§ 1473.7, subd. (a)(1), italics added.) A trial court is required to grant the motion if the moving party establishes the legal invalidity of the conviction by a preponderance of the evidence. (§ 1473.7, subd. (e)(1).)

Under the amended statute, "[b]ecause the errors need not amount to a claim of ineffective assistance of counsel, . . . courts are not limited to the *Strickland* test of prejudice[.]" (*Camacho*, *supra*, 32 Cal.App.5th at p. 1009.) Rather, "to establish a 'prejudicial error' under section 1473.7, a person need only show by a preponderance of the evidence: (1) he did not 'meaningfully understand' or 'knowingly accept' the actual or potential adverse immigration consequences of the plea; and (2) had he understood the consequences, it is reasonably probable he would have instead attempted to 'defend against' the charges." (*Mejia*, *supra*, 36 Cal.App.5th at p. 862.)

For the first prong, the inquiry focuses on the defendant's subjective error in not understanding or knowing the plea's adverse immigration consequences. (*Mejia*, *supra*, 36 Cal.App.5th at p. 871.) For the second prong, "the defendant may show prejudice by 'convinc[ing] the court [that he] would have chosen to lose the benefits of the plea bargain despite the possibility or probability deportation would nonetheless follow.' [Citations.]" (*Camacho*, *supra*, 32 Cal.App.5th at p. 1010.) A reasonable probability that a defendant would not have taken the plea can exist even if proceeding to trial would only amount to "throw[ing] a ""Hail Mary[.]"""[5] (*Mejia*, at p. 871.)

II. Analysis

Defendant argues that he is entitled to relief under section 1473.7[6] because (1) counsel in 1999 failed to advise him of the actual adverse immigration consequence of his plea—mandatory

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[5] As the United States Supreme Court has recognized, whether to accept a plea can involve considerations other than "the likelihood of success at trial." (*Lee v. United States* (2017) 582 U.S. ___ [137 S.Ct. 1958, 1966] (*Lee*).) It "also involves assessing the respective consequences of a conviction after trial and by plea. [Citation.] When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." (*Ibid.*)

[6] Section 1473.7 was amended during the pendency of this appeal. The parties do not dispute that section 1473.7, as amended, applies to defendant's motion. (*Camacho*, *supra*, 32 Cal.App.5th at p. 1007; see also *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 ["A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment. [Citation.]"].)

deportation;[7] and (2) that error was prejudicial because he would not have accepted the plea had he been so advised. Defendant asks us to reverse and remand with instructions to the trial court to grant his motion and vacate his convictions. In the alternative, he contends that he is entitled to a new hearing on his motion.

We need not determine whether counsel sufficiently advised defendant of the immigration consequences of his plea or whether any inadequacy in the advisement rose to the level of

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[7] A noncitizen convicted of an "'aggravated felony' under the Immigration and Nationality Act[] . . . is subject to mandatory deportation. [Citations.]" (*Lee*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1963]; see also 8 U.S.C. § 1227(a)(2)(A)(iii).) Defendant's convictions for robbery (§ 211) qualify as aggravated felonies for this purpose. (8 U.S.C. § 1101(a)(43)(G); *United States v. Martinez-Hernandez* (9th Cir. 2019) 932 F.3d 1198, 1202.) So does his conviction for kidnapping. (8 U.S.C. § 1101(a)(43)(F); *Delgado-Hernandez v. Holder* (9th Cir. 2012) 697 F.3d 1125, 1126 [per curiam].)

ineffective assistance of counsel.[8] That is because we conclude that defendant failed to demonstrate the requisite prejudice.[9]

As previously discussed, to establish prejudicial error under section 1473.7, defendant was required to show by a preponderance of the evidence that, had he known that his plea would result in deportation, "it is reasonably probable he would have instead attempted to 'defend against' the charges." (*Mejia*, *supra*, 36 Cal.App.5th at p. 862.) However, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee*, *supra*, 582 U.S. at p. ___ [137 S.Ct. at p. 1967].) Factors to consider in determining the credibility of a defendant's claim that he would have rejected a plea include "the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had

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[8] We note, however, that under the current state of the law, "when, as in this case, federal immigration law specifies in 'succinct, clear, and explicit' terms that a criminal conviction *will* result in deportability, . . . a criminal defense attorney must accurately advise his or her client of that consequence before the client enters a guilty plea. [Citation.]" (*People v. Patterson* (2017) 2 Cal.5th 885, 898, italics added.) A generic advisement that the conviction *may* result in deportation is insufficient. (*Ibid.*; see also *People v. Ruiz* (2020) 49 Cal.App.5th 1061, 1065.)

[9] In reviewing defendant's showing of prejudice, we exercise our independent judgment. (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.)

reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*People v. Martinez* (2013) 57 Cal.4th 555, 568 (*Martinez*).)

Here, other than the post hoc assertions set forth in defendant's declaration, there is no evidence that the immigration consequences were determinative to his plea decision. Nor is there any evidence that an immigration neutral plea could have been negotiated. To the contrary, counsel testified that he was "amazed" by the relative leniency of the plea given that defendant was facing a possible life sentence, and he did not think that an immigration neutral plea would have been a possibility. Furthermore, defendant has not even suggested what defenses would have been available had he elected to proceed to trial or the likelihood of success.

Defendant relies heavily on *Camacho*, *supra*, 32 Cal.App.5th 998, and *Mejia*, *supra*, 36 Cal.App.5th 859. In each of those cases—decided after section 1473.7 was amended—the appellate court reversed the denial of a former section 1473.7 motion and remanded with instructions for the trial court to grant the motion. (*Camacho*, at p. 1012; *Mejia*, at p. 874.) We recognize that some of the same evidence that was deemed compelling in those cases to warrant section 1473.7 relief is also present here. As in *Camacho*, defendant was brought to the United States as a toddler and had never left the country since. (*Camacho*, at p. 1011.) And, like the defendants in both cases, at the time of his plea, defendant had a young child who was a United States citizen. (*Camacho*, at p. 1011; *Mejia*, at p. 872.)

However, *Camacho* and *Mejia* are distinguishable from the instant case in a critical respect: The defendants in those cases were not facing indeterminate life sentences when they accepted

pleas. The defendant in *Camacho* pled no contest to possession of marijuana for sale and was sentenced to three years probation and community service. (*Camacho*, *supra*, 32 Cal.App.5th at pp. 1000–1001.) The defendant in *Mejia* pled guilty to three drug-related felonies; he had been facing a maximum sentence of six years four months but received three years probation and a 120-day jail sentence instead. (*Mejia*, *supra*, 36 Cal.App.5th at pp. 862–863, 872–873.) Like the trial court, we find that the extreme exposure faced by defendant here if he rejected the plea bargain weighs heavily against the likelihood that he would have done so. (See *Martinez*, *supra*, 57 Cal.4th at p. 564 ["[A] factor pertinent to the decision to accept or reject a plea may be the "'disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer . . . .'" [Citation.]"].)

As defendant has failed to show by a preponderance of the evidence that he suffered prejudice and, therefore, that his plea was "legally invalid" within the meaning of section 1473.7, we conclude that the trial court did not err in denying his motion to vacate his convictions.[10]

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[10] Because we have analyzed the existence of prejudicial error in light of section 1473.7 as amended, a remand for a new hearing would serve no purpose. (*People v. Ledbetter* (2014) 222 Cal.App.4th 896, 904 ["'The law neither does nor requires idle acts.'"].)

DISPOSITION

The trial court's order is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT